

AMERICAN ARBITRATION ASSOCIATION

CASE NO.: 01-14-0000-4439

In the Matter of Arbitration Between

CITY OF PHILADELPHIA

Employer

and

FRATERNAL ORDER OF POLICE,
LODGE NO. 5

Union

OPINION
AND
AWARD

ARBITRATOR:

Robert E. Light, mutually chosen
by the parties pursuant to the rules and regulations
of the American Arbitration Association

HEARING:

October 13, 2016 in Philadelphia, PA.

APPEARANCES:

For the Employer
Melissa Knight, Esq.
Richard Ross, Commissioner

For the Union
Marc L. Gelman, Esq.
(Jennings Sigmond, PC)
Sean M. Hawke, Private Detective
Edward Sawicki, Grievant

ISSUES:

Was there just cause for the discharge of Edward
Sawicki? If not, what shall be the remedy?

BACKGROUND

A hearing in this matter was held at the Philadelphia, Pennsylvania offices of the American Arbitration Association on October 13, 2016, with both sides present and duly represented by counsel and with both parties having full and complete opportunity to offer evidence and argument in support of their respective contentions. In lieu of filing post-hearing briefs, both counsel decided to sum up orally at the hearing, after which time the hearing was declared closed.

The City of Philadelphia (hereinafter the “City” or the “Employer”) and Fraternal Order of Police, Lodge No. 5 (hereinafter the “FOP” or the “Union”) are signatories to a current collective bargaining agreement. (Joint Exhibit No. 1). A grievance was filed by the FOP on behalf of Edward J. Sawicki, a Police Officer in Philadelphia, who had been terminated by the City on April 21, 2014 by the Commissioner’s Direct Action. A grievance was filed and the matter proceeded through the steps of the grievance procedure and when there was no resolution it was submitted to the undersigned for final and binding determination.

FACTS

Mr. Edward Sawicki the grievant herein, was a Police Officer with the Philadelphia Police Department, with his date of hire being June 20, 2005. He worked in the 25th District which is in North Philadelphia. An incident occurred on October 20, 2013 while the grievant was off duty which ultimately led to his termination by the City on April 21, 2014.

The incident in question took place near a popular late-night eating establishment called Pat’s Steaks at approximately 2:45 a.m. As often happens in cases of this nature, versions of what transpired that evening differ as between the grievant and the complainant.

At the hearing, the grievant testified in his own behalf while the City's case proceeded via the testimony of Lt. Richard Sysol, who works in Internal Affairs, as well as Police Commissioner Richard Ross. Testifying on behalf of the grievant was Detective S ■■■ H ■■■, a private detective as well as the grievant himself.

The incident was between a citizen named L ■■■ F ■■■ a black male and the grievant F ■■■ Z ■■■ a white male. According to the court documents introduced into evidence, the grievant called Mr. F ■■■ a racial epithet and in addition showed him his gun. Mr. F ■■■ called 911; the matter proceeded to Internal Affairs and thereafter there was a notice of dismissal which reads as follows:

On October 20, 2013, approximately 2:45 AM, L ■■■ F ■■■ was walking in the area of 1300 S. 9th Street when you, off duty and operating your privately owned vehicle, backed up your vehicle, striking F ■■■'s knee, causing no injury. F ■■■ hit the trunk of your vehicle with his hand in order to let you know that you backed into him. You exited your vehicle, pulled up your shirt, showing a gun and rushed at him. You stated, "Nigger, I'll smoke you," while keeping your hand on your holstered gun. You also stated, "Make a scene nigger and I'll fucking kill you out here." F ■■■ then took off his shirt to show you that he was unarmed. Fouse contacted the police who arrived on the scene. You were identified as an off duty Philadelphia Police Officer. Your gun, a city issued firearm, was confiscated. An independent eyewitness observed the incident and positively identified you as the man who threatened F ■■■

By your actions, you have indicated that you have little or no regard for your responsibility as a member of the Philadelphia Police Department. Therefore, you will be dismissed after being placed on a thirty day suspension.

On 4/2/14 in the presence of Captain Robert Heinzerth #6, Internal Affairs Division, Captain Michael Cram #3, 25th District, Sergeant Andrew Yaletski #594, Internal Affairs Division, Sergeant Calvin White #8844, Internal Affairs Division, William Brennan, Esq., Attorney and John McGrody, Representative, Fraternal Order of Police you were given your Criminal Gniotek Warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate 30-day suspension, with the intent to dismiss.

Police Officer Sawicki testified in his own defense at the hearing. He stated that he was off duty with his girlfriend and they went to Pat's at approximately 2:15 a.m. He stated that he was sitting in the car with his girlfriend when they heard a bang and an individual (Mr. F [REDACTED]) told the grievant that "you almost hit him." The grievant said that that individual took off his shirt whereupon the grievant testified that he identified himself as a Philadelphia Police Officer. Thereupon Mr. F [REDACTED] called 911, the police arrived and the grievant testified that they all went to Internal Affairs with eventually the grievant being discharged from his position as a Police Officer with the City. At trial the grievant and Mr. F [REDACTED] testified as did Mr. J [REDACTED] an employee of Pat's Steakhouse.

Richard Ross, Police Commissioner, was given all of the "facts" and based thereon by Commissioner's Direct Action, he discharged the grievant on April 21, 2014. While Commissioner Ross testified at the hearing, he had no personal knowledge of what occurred on the evening in question but made his decision based upon the documents and what he was told by others. The basis of the decision, as I understand it, was that the grievant uttered a racial epithet and he flashed his gun.

Testifying on his own behalf at the hearing was grievant Edward Sawicki. Officer Sawicki stated that on the evening in question he was off duty and with his girlfriend, having gone to Pat's that evening at approximately 2:15 a.m. He unequivocally stated that he never issued a racial epithet against Mr. F [REDACTED] and that Mr. F [REDACTED] was simply lying. He stated that Mr. F [REDACTED] was belligerent and that, in short, he did nothing wrong on the evening in question.

POSITION OF THE CITY

The City takes the position that the grievant was properly terminated and that the arbitrator should uphold the position of the City in that regard. It maintains that the grievant uttered a racial epithet directed to Mr. F [REDACTED] and that, as a Police Officer in the City of Philadelphia, that certainly is not permissible. Further, showing a citizen his gun is also not permitted by a Police Officer and this too was done by the grievant on the night in question. It asks the arbitrator to so find and to uphold the City's action in terminating Officer Sawicki.

POSITION OF THE UNION

The Union, on the other hand, takes the position that this off duty Police Officer did "nothing wrong" on the evening in question. It cites the prior criminal trial wherein the jury failed to credit the complainant's version of the events but instead credited the grievant's version of events. It maintains that the arbitrator is unable to credit Mr. F [REDACTED]'s version of what occurred since he did not testify at the hearing. It asks that the grievance be sustained and that the grievant be reinstated to his prior position with the employer and be made whole.

DISCUSSION

The arbitrator has carefully weighed all of the evidence in the case including the testimony of the witnesses at the hearing, the arguments of respective counsel as made at the hearing, the exhibits which included the transcripts of the judicial proceedings, as well as all of the other evidence prior to reaching his decision. To be sure, this comes down to a question of credibility with the version of events as related by the grievant being at odds with the version of what transpired being told by Mr. F [REDACTED] prior to the arbitration hearing which, as the arbitrator notes, Mr. F [REDACTED] not being present. In any event, arbitrators look at various factors in order to ascertain credibility, that is who is not telling the truth and who is. Assessing credibility is no

easy task for arbitrators to perform and where, as here, portions of the testimony are in such direct conflict that task becomes all the more difficult. However, of necessity, credibility findings have had to be made so that the arbitrator utilized those kinds of tests in order to ascertain credibility namely, the demeanor of the witnesses as they testified, the reasonableness of the stories that were told, the existence of conflicts with other assertions of fact, and the simple plausibility of the grievant's story when weighed against ordinary experience and common sense.

In evaluating a witness's credibility, arbitrators look at the following factors:

- (1) Interest or lack of interest in the outcome of the case;
- (2) The relationship to the party;
- (3) The ability and opportunity to know, remember, and relay the facts;
- (4) The manner and appearance;
- (5) The age and experience;
- (6) The frankness and sincerity, or lack thereof;
- (7) The reasonableness or unreasonableness of the testimony in light of all the other evidence in the case;
- (8) Any impeachment of the testimony; and
- (9) Any other factors that bear on believability and weight.

At the hearing, testimony adduced indicates that while there were video capabilities showing what transpired on the day in question, none showed where the incident occurred. Further, from the City's point of view, the difficulty here is that Mr. F [REDACTED] the complaining witness, never testified at the arbitration proceeding and obviously, the arbitrator is unable to credit his version of what transpired since, as just noted, he did not appear and did not give sworn testimony before

this arbitrator. The arbitrator therefore is presented with a situation where really the only competent testimony is that of the grievant who, while the arbitrator carefully observed his behavior and demeanor at the hearing, must find him to be credible. That being so, the arbitrator is reinstating Officer Sawicki to his prior position with back pay but, of course, subject to the pre-hiring conditions imposed by the City prior to his reinstatement.

Therefore, the undersigned having duly heard all of the proofs and allegations of the parties to this proceeding makes the following award:

AWARD

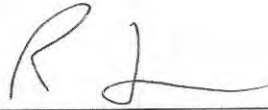
There was not just cause for the discharge of Edward Sawicki. He shall be reinstated to his prior position with the City with full back pay and in other respects be made whole subject, however, to the hiring conditions imposed in these kinds of cases prior to his reinstatement.



ROBERT E. LIGHT, ARBITRATOR

AFFIRMATION

I, Robert E. Light, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.



Robert E. Light, Arbitrator

Dated: January 24, 2017